

Dr. Milena Polojac

Associate Professor

Univeristy of Belgrade Faculty of Law

polojac@ius.bg.ac.rs

CASUISTRY AND GENERAL RULES PROBLEM OF RISK BEARING IN ROMAN *SOCIETAS*

The author discusses the question of division of losses among partners occurred without anyone's fault (periculum, damnum commune). She analyses three situations in which this problem is solved differently. The first one is concerned with socii holding goods in common as co owners. The analysed sources are Ulpian, D. 17.2.58.pr (quadriga case) and D. 17.2.58.1. The second situation is concerned with partners contributing their property into the partnership for the purpose of use and damage occurring to the goods owned by one of the socii (sources: Ulpian, D. 17.2.52.4, Pomponius/Labeo D. 17.2.60.1 and Ulpian/Iulian D. 17.2.61). The third is the case of the so called mixed societas in which one socius contributes with capital and the other only with his work (sources: Ulpian, D. 17.2.52.2, and D. 17.2.52.3). The author stresses that rich casuistry with different solutions and even contradictions prevails, so general principles and concepts are not very helpfull. However, the rule casum sentit dominus is of great importance here and should not be underestimated.

Key words: *Casuistry. Roman Law. Risk. Societas. Quadriga case.*

I

Considering that partnership is established, as a rule, for the purpose of gaining material advantage, the issue of profit distribution among the partners (*lucrum, commodum*), as well as the distribution of eventual loss (*damnum, incommodum*), is one of the most important questions in the legal system allowing for *societas*. The expressions *damnum* and *incommodum* should be understood here as the material loss incurred by a partnership without anybody being at fault. Hence, the appropriate term

for a situation of this kind is also risk, *periculum*, considering that the question is how to distribute the burden of loss that cannot be ascribed to anybody as his fault.¹ Although risk sharing is an issue characteristic of *societas* and one by which it is distinguished, there are not many papers in charge with this subject. However, two studies may be singled out: Giuseppe Gandolfi in his article “*Damnum commune*” published in 1971, focuses two well known fragments from the *Digest* title *pro socio*² trying to solve an existing contradiction³. The contribution by Karl-Heinz Misera⁴ is particularly worthy of praise, given the fact that it represents an unsurpassed attempt to put together a mosaic of this complicated issue. He has shown with reason that general rules and theories are not very helpful here. However, it seems that he has underestimated the importance of the rule *casum sentit dominus*. It should be noted that Franz-Stefan Meissel, the author of the most recent book on Roman *societas*,⁵ although he discusses many important texts related to the problem of *periculum*, does not treat this issue as a separate topic. It seems that there is still room for a contribution to this subject.

II

In principle, it can be said that partnership is a community of profit and risk, but this does not say much in itself, because solutions in different cases depend on different circumstances. Some criteria are general and may be reduced to certain legal rules (*regulae iuris*), while on the other hand in many cases, solutions derive from the circumstances of the specific case.

¹ Still, it has to be noted that the term *periculum* cannot be assigned one single meaning in Roman law, as the modern theory of risk tried to do. It does not signify only a situation where damage has resulted without anybody's fault. It is sometimes used as a synonym for contractual liability for damage. This meaning of the above expression can also be found in the context of Roman partnership (Paulus, D. 17.2.25). The most profound analysis of different meanings of the term *periculum* can be found in two articles by G. MacCormack, “Periculum”, *Zeitschrift der Savigny Stiftung für Rechtsgeschichte, Romanistische Abteilung* (ZSS RA) 96/1979, 129–172 and “Further on ‘Periculum’”, *Bulletino internazionale di diritto romano* (BIDR) 82/1979, 11–37. See also C. A. Cannata, “Sul problema della responsabilità nel diritto privato romano”, *IURA* 43/1992, 63 etc; P. Voci, “Diligentia”, “custodia”, “culpa”. I dati fondamentali”, *Studia et documenta historiae et iuris* (SDHI) 56/1990, 131 etc.

² Pomponius, D. 17.2.60.1 and Ulpianus, D. 17.2.52.4.

³ G. Gandolfi, “*Damnum commune*”, *Studi in onore di Eduardo Volterra* III, Milano 1971, 527–543.

⁴ K. H. Misera, “Zur Gefahrtragung bei der römischen *societas*”, *Iuris professio. Festgabe für Max Kaser zum 80. Geburtstag*, Wien 1986, 201–210.

⁵ F. S. Meissel, *Societas. Struktur und Typenvielfalt des römischen Gesellschaftsvertrages*, Peter Lang, Frankfurt am Main 2004.

First of all, regulation of this issue depended on the partners' autonomy of will, and judging by the sources, the principle of freedom of contract had gained a strong reaffirmation here. The position of partners with regard to the distribution of profit and risk could be mutually unequal, i.e. certain partners could have different shares in the distribution of profit and loss.⁶ Also, individual partners could have a different share in the profit as compared to the risk.⁷ Finally, the individual partners could be fully excluded from the distribution of risk if their share comprised exclusively labour,⁸ and they could only have a share in the distribution of profit. The only obstacle to achieving full freedom of the autonomy of will was the prohibition of the so-called *societas leonina*, which was a partnership where one of the partners could be excluded from sharing in the distribution of profit, while still bearing the loss.⁹ Such a partnership would be null and void. If the parties failed to expressly stipulate the way of distributing the profit and risk, the applicable rule would be distribution based on equal shares regardless of the size of the contribution.¹⁰ Such a liberal position of Roman classical jurisprudence was the result of a fierce clash of opinions between the influential pre-classical jurists Quintus Mucius Scaevola and Servus Sulpicius, which is referred to in the sources as *magna questio*.¹¹ This clash of opinions ended in the victory of the liberally minded position of Servius Sulpicius, which probably also marked a departure from the traditional view.¹² An aspect that certainly deserves attention is the special position of the partner whose share consisted of labour exclusively. This partner could be completely excluded from sharing risk, however, only up to the value of his labour.¹³

III

The second criterion affecting the issue of distribution of profit and risk was the system of ownership of the shares contributed to the partnership. Partners could contribute their shares based on co-ownership, whereby in addition to creating an obligation-based partnership they could

⁶ *Gai Inst.* 3.150.

⁷ *Gai Inst.* 3.149, *Inst.* 3.25.2.

⁸ Ulpian, *D.* 17.2.29.1.

⁹ Ulpian/Aristo/Cassius, *D.* 17.2.29.2.

¹⁰ *Gai Inst.* 3.150.

¹¹ *Gai Inst.* 3.149.

¹² With more details on this problem M. Polojac, "Podela dobiti i gubitka među ortacima rimsko pravo i moderna rešenja" [Distribution of profit and risk Roman law and modern solutions], *Anali Pravnog fakulteta u Beogradu* [Annals of the Faculty of Law in Belgrade] 2/2005, 130 144.

¹³ Ulpian, *D.* 17.2.29.1.

also create a property law community (*communio*). This type of partnership was named *societas quoad sortem* in the medieval period. Partners could contribute their shares for common use only – *societas quoad usum*. The prevailing view among German Romanists recently, probably under the influence of Wieacker's works, was that this distinction was not sufficient for covering all the options of ownership relations in a partnership specified in Roman sources, and therefore, a trichotomy was established by introducing a new name – *societas quoad dominium* – which was opposed to the *quoad sortem* type of partnership.¹⁴ The first is based on co-ownership. In the second case, there was a community of property based on the law of obligations, without the need for establishing a community based on property law, with partners assuming the risk of eventual tortless property loss, in the proportion stipulated in the contract. What we are concerned with here is, therefore, primarily a community of risk-bearing based on the law of obligations. By creating a new distinction of this kind, it seems that the intention was to eliminate the difference between partnerships based on the law of obligations on one side, and co-ownership on the other side, and to reduce to a minimum and even eliminate the effect that the *casum sentit dominus*-rule had on partnership contracts. Apart from this, by introducing the *quoad sortem* type of partnership as a community of risk-bearing based on the law of obligations, another type of confusion was caused, because it could lead one to conclude that *societas quoad usum* did not imply any sharing of profit and risk – which was a wrong inference.

Certainly the best example of the impact of the ownership system on the problem of risk distribution is the well-known case of the four horse team (*quadriga*):

D. 17. 2. 58. pr. (Ulpianus, 31 ad edictum): *Si id quod quis in societatem contulit extinctum sit, videndum, an pro socio agere possit. tractatum ita est apud Celsum libro septimo digestorum ad epistulam Cornelii Felicis: cum tres equos haberes et ego unum, societatem coimus, ut accepto equo meo quadrigam venderes et ex pretio quartam mihi redderes. si igitur ante venditionem equus meus mortuus sit, non putare se Celsus ait societatem manere nec ex pretio equorum tuorum partem de beri: non enim habendae quadrigae, sed vendendae coitam societatem. ceterum si id actum dicatur; ut quadriga fieret eaque communicaretur tuque in ea tres partes haberes, ego quartam, non dubie adhuc socii sumus.*

In this famous text by Ulpian which has been the subject of different interpretations, Ulpian, citing the opinion of his predecessor Celsus, speaks about two partnership variants where two persons contributed their horses to form a four horse team. In the first variant *ego* contributed one horse and *tu* contributed three. Their purpose was to sell the horses as a

¹⁴ F S. Meissel, 227 fn. 2.

four horse team (*vendere quadrigam*) and thus get a better price than if they sold each horse individually, and then, to divide the profit in the proportion of 1/4 to 3/4. The horse of the *ego* person, however, died before the sale, and according to Celsus the risk was to be borne by *ego*. It seems correct to conclude that the key reason for presenting this solution regarding the assumption of risk was the fact that in this partnership *ego* remained the owner of the dead horse (*ante venditionem equus meus mortuus sit*) having contributed it to the partnership just for the purpose of its being used (*societas quoad usum*) i.e. for the purpose of selling it. In order to clarify the situation Celsus presents another possible option where the four horse team could be formed for a lasting purpose, i.e. for common use of the four horse team (*habere quadrigam*). The community of property would be such that *tu* would have three quarters of the four horse team, while *ego* would only have one quarter. A formulation of this kind points to the fact that the partners *ego* and *tu* were co-owners of the *quadriga* in aliquot parts of 1/4 to 3/4, and that they would bear the risk jointly in that proportion. This interpretation still seems to be the prevailing one, and its advocate has been F.-S. Meissel.¹⁵

However, Misera considers that the text gives no reason for making a distinction in terms of the ownership system. He says: *in beiden Varianten hat ego sein Pferd nicht an tu übereignet oder sonst sein Alleineigentum verloren, sondern er ist Eigentümer geblieben.*¹⁶ According to him, the key difference is in the aim of the community; *vendere quadrigam* as opposed to *habere quadrigam*. Apart from this, he, just like Drosdowski who shares his opinion, denies that the part of the text discussing possession of the four horse team in the proportion of 3/4 to 1/4 (*ut quadriga fieret eaque communicaretur tuque in ea tres partes haberes, ego quartam*) points to the formation of co-ownership of the four horse team, believing that the case involved is more likely a community based on the law of obligations, of the *quoad sortem* type, which also implied the joint assumption of risk.¹⁷

Another text by Ulpian, i.e. the next paragraph in the same fragment, appears to follow the same reasoning:

D. 17.2.58.1 (Ulpianus, 31 ad edictum): *Item Celsus tractat, si pecuniam contulissetus ad mercem emendam et mea pecunia perisset, cui perierit ea. et ait, si post collationem evenit, ut pecunia periret, quod non*

¹⁵ F. S. Meissel, 274. Also, M. Kaser, "Neue Literatur zur 'Societas'", SDHI 41/1975, 294 fn. 60. He considers that co ownership of the *quadriga* as *universitas rerum* was created by *accessio*.

¹⁶ K. H. Misera, 205; Also T. Drosdowski, *Das Verhältnis von actio pro socio und actio communi dividundo im klassischen römischen Recht*, Berlin 1998, 152.

¹⁷ The influence of Franz Wieacker is evident. He interprets *communicare* in this text as "zum gemeinschaftlichen Gebrauch bereitstellen", F. Wieacker, "Das Gesellschafterverhältnis des klassischen Rechts", ZSS RA 69/1952, 335.

fieret, nisi societas coita esset, utrique perire, ut puta si pecunia, cum peregre portaretur ad mercem emendam, periit: si vero ante collationem, posteaquam eam destinasses, tunc perierit, nihil eo nomine consequeris, inquit, quia non societati periit.

This text is similar to the previous one primarily as it also discusses two variations, two possible situations, raising the issue of the assumption of risk. It discusses a partnership involving two persons who contributed their money for the purpose of jointly purchasing goods, however, the stake – i.e. the money of one partner – was lost. This text also lends itself to different interpretations. However, the first thing that may be noted regarding the criterion for the assumption of risk in Celsus's opinion is whether the money was lost after it had been contributed (*post collationem*) or before it was contributed to the partnership (*ante collationem*). In the first case, both partners' money was lost (*utrique perire*), while in the second, the risk was borne by the partner who lost the money, even though the partner had already earmarked and intended the money for the partnership (*destinatio*). It seems that the crucial reason for such a solution is the issue of ownership of the money. In the first option, *post collationem*, co-ownership was most likely created.¹⁸ Partners created a joint fund or one partner handed over his money to the foreman who was to carry out the purchase on their joint behalf and with their common money. In technical terms, the way of acquisition could be *traditio* or *commixtio*. In the second case, the money was not contributed, i.e. it was not handed over even though it had been earmarked for the partnership, and therefore, it had remained the partner's property.

Celsus states that for joint assumption of risk, the loss of money had to have occurred in a situation directly related to the activity of the partnership, and therefore it is important for the loss not to have occurred in a way unrelated to the existence of the partnership. He provides an example presenting a case where money intended for the purchase of joint goods was lost during a trip abroad (*ut puta si pecunia, cum peregre portaretur ad mercem emendam periit*). Thus, if an *argumentum a contrario* is presented, joint risk would be excluded in the event where joint money had been lost, for instance, because of a fire that had broken out before the partners set out on the trip, as the loss of the money would not be directly related to the activities of the partnership. It seems that such a solution would be hard to be implemented, because after handing over the money it was normally impossible to identify whose money had been

¹⁸ In his interpretation of this and the previous text, Misera insists on the point that creation of co ownership is not necessary, which is acceptable, but also not likely, which is not. K. H. Misera, 206–207. Talamanca with reason states: “non era certamente necessaria la creazione di una *communio*, anche se, evidentemente, tale creazione risolveva *radicatus* il problema”, M. Talamanca, “Società (Diritto romano)”, *Enciclopedia del diritto*, Mailand 1990, 857 fn. 469.

lost. *Nota bene*: if it was handed over in a leather bag it could still be identified and even reivindicated; only once it was mixed with the receiver's money – as was usual in case of partnership – did it become impossible to identify it. Thus, it seems right to conclude that in this example the issue of ownership of money in a partnership was crucial in determining the manner of bearing the risk.

However, there are also certain specific solutions in case of partnerships other than *societates omnium bonorum*. Where one of the partners lends the partners' common money to another person on interest *suo nomine*, he alone bears the risk; however, he is entitled to the interest which he does not have to share with the other partners. On the other hand, where the money is lent on behalf of all the partners, the profit and the risk deriving from it are shared by all the partners.¹⁹

IV

Risk was joint (*damnum commune*) in the event where there was neither a property law community (*communio*) among the partners, nor a previously stipulated risk-bearing community based on the law of obligations. The partners shared the risk also when damage had been caused to the property which was the exclusive property of one partner, under certain conditions that could be very hard and severe. In Roman casuistry, there is a well-known example of partnership for this situation concerning a textile merchant (*sagaria negotio*) in the Ulpian's text citing Julian's opinion:

D. 17.2.52.4 (ULPIANUS, libro trigesimo uno ad edictum): *Qui dam sagariam negotiationem coierunt: alter ex his ad merces comparandas projectus in latrones incidit suamque pecuniam perdidit, servi eius vulnerati sunt resque proprias perdidit. dicit Iulianus damnum esse commune ideoque actione pro socio damni partem dimidiam adgnoscerere debere tam pecuniae quam rerum ceterarum, quas secum non tulisset socius nisi ad merces communi nomine comparandas proficisceretur. sed et si quid in medicos impensum est, pro parte socium agnoscerere debere rectissime Iulianus probat. proinde et si naufragio quid periit, cum non alias merces quam navi solerent advehi, damnum ambo sentient: nam sicuti lucrum, ita damnum quoque commune esse oportet, quod non culpa socii contingit.*

A partnership was contracted for the purpose of trading in textiles. One of the partners went to buy the goods, but was ambushed and lost his money. His slaves were wounded and he lost some of his belongings. Julian says that the loss was joint and that the other partner had to bear

¹⁹ Paulus, D. 17.2.67.1.

half the damage based on the *pro socio* claim, with regard to both the money and the other things that the other partner would not have had with him if he had not needed them for the purchase that was in their common interest. If any costs of medical treatment were involved, Julian rightly considers that the other partner was to bear (an equal) part of the costs. Moreover, if something had been lost in a shipwreck, provided the only goods on board the ship were those that were usually transported, the damage had to be borne by both of them, as damage had to be joint unless a fault by one of the partners was involved.

In this case, there are several limitations to be singled out, under which the partner whose things had been lost or damaged could expect the participation of the other partner in their joint risk-bearing. The text describes the case of an attack by robbers on a trip undertaken in the interest of the partnership (*latrocinium, incidere in latrones*). Later, the text also discusses the case of a shipwreck (*naufragium*) which happened during a business trip. Even though these individually mentioned cases were not the only possible situations where common risk-bearing was involved, it seems impossible to draw the conclusion that the rule on joint risk-bearing applied to all cases that could be characterised as *force majeure* (for instance, the case of natural death of slaves or animals that had been taken on the trip). Apart from this, such an irreversible contingency had to have happened on a trip undertaken in the common interest of the partners. Also, common bearing of any damage was not provided for. Thus, for instance, the rule on joint damage refers to things owned by partners, which were necessary for their joint enterprise, but it does not refer to other things (*quas secum non tulisset socius nisi ad merces communi nomine comparandas proficisceretur*). Also, the costs of medical treatment of a slave were recognised, but this did not apply to a free man, as can be seen from the text below.²⁰

In the well-known case of slave merchants partnership (*societas venaliciaria*), the condition regarding risk-bearing is even more strict:

D. 17.2.60.1 (Pomponius, 13 ad Sabinum): *Socius cum resisteret communibus servis venalibus ad fugam erumpentibus, vulneratus est: im pensam, quam in curando se fecerit, non consecuturum pro socio actione Labeo ait, quia id non in societatem, quamvis propter societatem impensum sit...*

According to Labeo, a partner who suffered injuries in an attempt to prevent the escape of common slaves intended for sale, could not request the sharing of other partners in the costs of his own medical treatment, as the costs were not directly invested in the partnership, but were

²⁰ The problem is profoundly discussed by G. Gandolfi, 527 etc; see also K. H. Misera, 202, R. Zimmermann, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Oxford 1996, 461; F. S. Meissel, 135 etc.

spent because the existence of the partnership caused them to be spent (*quia id non in societatem, quamvis propter societatem impensum sit*). It is hard to accept this explanation by Labeo.²¹ It is possible that such a strict position derives from the fact that the partner appeared not to have been successful in his action aimed at preventing the slaves from escaping. In a certain way, this can be ascribed to his fault in the specific form of recklessness (*infirmitas, imperitia*), considering the specific activity of this type of partnership. Another explanation for such a strict solution could be the fact that the costs of medical treatment of a free man were concerned here. It is well known that in Roman law it was difficult to introduce these costs in the concept of material damage (*damnum*). However, one must bear in mind that the next very short fragment provides an opposite view.²² It is important to note that Pomponius, citing Labeo, does not discuss the problem of damage caused by the escape of common slaves. This situation does not produce any complicated problems. If that loss was tortless, the *casum sentit dominus* rule applied.

V

There is a specific situation regarding risk-bearing also when one partner has contributed only property and the other one exclusively labour. An example of such a community is usual in agriculture, and there is a well-known partnership case discussed by Cicero (*Pro Roscio comedo*), where the owner of a slave Q. Roscius Gellius and the actor C. Fannius Chaerea formed a partnership in order to teach the slave Panurgius the art of acting. Let us try to get a full insight into the problem by discussing the example of partnership in agriculture:²³

D. 17.2.52.2 (Ulpianus, 31 ad edictum): *Utrum ergo tantum dolum an etiam culpam praestare socium oporteat, quaeritur. et Celsus libro septimo digestorum ita scripsit: socios inter se dolum et culpam*²⁴ praes

²¹ See G. Gandolfi, 530 etc; also F. S. Meissel, 136 etc.

²² Ulpian, D. 17.2.61: *secundum Julianum tamen et quod medicis pro se datum est recipere potest.*

²³ More about this issue G. Santucci, *Il socio d'opera in diritto romano*, Mailand 1997.

²⁴ *Et culpam* is under suspicion of being an interpolation of post classical origin. Arangio Ruiz explains the prevailing view in doctrine till the middle of the last century according to which the *dolus* liability was the only standard of liability in the early period and also in time of classical law, and the liability for *culpa* is of post classical origin. V. Arangio Ruiz, *La società in diritto romano*, Napoli 1950, ristamp. 1965, 190 etc. Although the question is still the subject of scholarly dispute, the prevailing view today considers the concept of *culpa* to be classical. See for example C. A. Cannata, 1 etc., H. Ankum, "La responsabilità contrattuale nel diritto romano classico e nel diritto giustiniano", *Diritto romano e terzo millennio, Radici e prospettive dell'esperienza giuridica*

tare oportet. si in coeunda societate, inquit, artem operamve pollicitus est alter, veluti cum pecus in commune pascendum aut agrum politori damus in commune quaerendis fructibus, nimirum ibi etiam culpa²⁵ praestanda est: pretium enim operae artis est velamentum. quod si rei communi socius nocuit, magis admittit culpam quoque venire.

The text discusses the partnership involving the owner of a herd and an expert in pasture, in other case an expert in crop breeding (*politor*). In both cases, according to general provisions, profit from the transaction as well as eventual loss were borne by the partners according to their agreement, and if no agreement had been made, then it was borne in equal parts. As opposed to other partnership types, an agreement could contain the provision specifying that a partner, whose share consisted exclusively of labour, could be excluded from bearing risk. That exception, however, was not absolute, and the value of the labour the partner had contributed as his only contribution to the partnership would be compensated against the damage – *si tanti sit opera quanti damnum est*.²⁶ This atypical system in the so-called mixed *societas* can be explained in the following manner: Although this is in the domain of a hypothesis that cannot be explained here in detail,²⁷ in early Roman Law it was most likely impossible to enter into a partnership when the contribution of one partner consisted exclusively in his labour. The possible reason could be that a partner who had contributed only his labour had a specific position, especially in respect of risk. On the other hand, it was fairly unusual for a contribution in a partnership to comprise solely assets, as was the case here. Namely, partners were expected to work together towards achieving the aim of the partnership, and management belonged to all the partners jointly. It was not unusual for one of the partners to distinguish himself by his contribution in the form of labour for which he could be rewarded in different manners. However, it was not usual for a partner not to contribute any form of labour. This is why a partnership set up in this form

contemporanea, relazioni del convegno internazionale di diritto romano, Copanello 3 7 giugno 2000, Napoli 2004, 144.

The paragraph is considered genuine by Talamanca: “Sarebbe ingiustificato un genere sospetto sul passo, soprattutto perché la discussione vi procede in base al metodo casistico, lasciando cogliere le tracce di possibili contraddizioni tra i *prudente*”, M. Talamanca, 856, fn. 452. The existing dilemma in the text could probably be ascribed to Celsus and not to Ulpian. Celsus refers only to two particular cases because in his time *culpa* (*in abstracto*) as general standard of liability still did not exist. In this sense F. S. Meissel, 292, fn. 194.

²⁵ Arangio Ruiz replaced *culpa* with *custodia*: “invece delle parole *nimirum etiam culpa praestanda est*, Celso (e con lui Ulpiano) aveva scritto *etiam custodia praestanda est*.” V. Arangio Ruiz, 192. In this sense also R. Zimmermann, 464; E. Laffely, *Responsabilité du “socius” et concours d’actions dans la société classique (thèse de licence et de doctorat)*, Lausanne 1979, 27 etc., also 53 etc.

²⁶ Ulpian, D. 17.2.29.1.

²⁷ More details about this issue M. Polojac, 135 etc.

can be qualified under certain circumstances as another contract, most often as *locatio conductio*²⁸, *depositum*, *commodatum* or as an innominate contract.²⁹ The fact that the parties shared profit and risk speaks in favour of partnership.³⁰

It is necessary to note some other specifics. A partner contributing his labour was an expert. Ulpian's text states that he was liable for *dolus* and *culpa*. It appears that the contractual liability of this partner was not subject to the general rule as formulated by Gaius, and later Justinian.³¹ In this text, *culpa* does not mean a lack of diligence that a partner shows towards his things (*diligentia quam in suis*).³² The general rule about the responsibility of partners here is modified in accordance with the nature of the contract. In this case, *culpa* certainly means a lack of what is referred to in the sources as *exactissima diligentia*, and it can also have specific meanings, such as for instance, lack of skill (*imperitia*) and the like.³³ In any case, the responsibility of a partner who invested only his labour was more strict than that of a "common" partner, and that is why the area covered by *periculum* is more narrow.

Considering that the situation here involved damage caused to things owned exclusively by one partner, it is possible to apply the analogy with the previously mentioned cases, particularly that of the partnership involving textile merchants. This is, nevertheless, under a question-mark, as the situation is not identical. Here, the thing was damaged while it was with the pasture expert who was the foreman, but not the owner, whereas in the textile merchants case, damage occurred to things owned

²⁸ Ulpian/Celsus D. 19.2.9.5.

²⁹ F. S. Meissel, 181 etc.

³⁰ D. 19.2.25.6 (GAIUS libro decimo ad edictum provinciale): *Vis maior, quam Graeci θεοῦ βίαν appellant, non debet conductori damnosa esse, si plus, quam tolerabile est, laesi fuerint fructus: alioquin modicum damnum aequo animo ferre debet colonus, cui immodicum lucrum non aufertur. apparet autem de eo nos colono dicere, qui ad pecuniam numeratam conduxit: alioquin partitarius colonus quasi societatis iure et damnum et lucrum cum domino fundi partitur.*

³¹ D. 17.2.72 (GAIUS libro secundo cottidianarum rerum): *Socius socio etiam culpa nomine tenetur, id est desidiae atque negligentiae. culpa autem non ad exactissimam diligentiam dirigenda est: sufficit etenim talem diligentiam communibus rebus adhibere, qualem suis rebus adhibere solet, quia qui parum diligentem sibi socium acquirit, de se queri debet.* The text is incorporated into *Inst.* 3.25.9.

³² It seems that Gaius took over the idea from Celsus and his text related to depositum (D. 16.3.32) and apply it in case of *societas*. In the fragment of Celsus, *diligentia quam in suis rebus* is opposed to *dolus* (and *culpa lata*) as a kind of its extension. Gaius, however, compares the *diligentia quam in suis* with the *exactissima diligentia*. In this case, so called *culpa in concreto* could be understood as alleviation of a more severe liability i.e. *culpa in abstracto*. More about the discussion in literature E. Laffely, 33 etc., F. S. Meissel, 293 etc.

³³ Cannata calls this type of culpa "la colpa imperizia" in case of *fullo*, *sarcinator*, *textrix*, *mulio*, *politor agrorum*, C. A. Cannata, 44; H. Ankum, 144 145.

by the partner-foreman. Still, resorting to analogy, one have to apply the already known criteria that narrow down the domain of joint risk-bearing, such as for instance, the request that damage be directly related to the activities of the partnership. Thus for instance, the natural death of the herd would not imply joint risk, whereas it would in the case of an attack by robbers that took place while the herd was grazing, and the like.

Some more light is shed on this problem by the next paragraph from a fragment by Ulpian (D. 17.2.52.3): *Damna quae imprudentibus accidunt, hoc est damna fatalia, socii non cogentur praestare: ideoque si pecus aestimatum datum sit, et id latrocinio aut incendio perierit, commune damnum est, si nihil dolo aut culpa acciderit eius, qui aestimatum pecus acceperit: quod si a furibus subreptum sit, proprium eius detrimentum est, quia custodiam praestare debuit, qui aestimatum accepit. haec vera sunt, et pro socio erit actio, si modo societatis contrahendae causa pascenda data sunt quamvis aestimata.*

The text is about a variant of the previous contract between the owner of a herd and a pasture expert, to the extent that the herd was entrusted to a pasture expert based on an estimate of its value (*pecus aestimatum datum*). The difference in relation to the previous contract is reflected in the even stricter liability of the expert. As it appears from the source, he is also responsible for *custodia* (*custodiam praestare debuit*) in the event of a theft of the herd. However he is not liable for contingencies that cannot be avoided while the herd was with him, such as an attack by robbers (*latrocinium*) or fire (*incendium*), and so, in these cases the risk is borne jointly (*damnum commune*), unless stipulated otherwise.³⁴

The above cases are specific in that the contractual liability of the partner who contributed his labour was stricter, and hence, the domain of joint risk was narrowed. This domain was narrowed down also when, by applying analogy with the previous related but not identical cases, stricter criteria are applied to joint risk-bearing, such as the rule based on which damage must be directly related to the activities of the partnership. A fact that needs to be highlighted particularly is that the partner who contributed only his labour could be excluded by contract from bearing risk, which can be understood as a type of offset for the stricter criteria of his contractual liability.

To conclude. As for the issue of risk-bearing in *societas*, we are faced with rich casuistry with different solutions and even contradictions. In order to expose the problem – unlike the sources do – in a kind of system, three situations are singled out in which the problem of division of losses among partners is solved differently: the first one is about *socii* holding goods in common as co-owners, the second is concerned with partners contributing their property to the partnership for the purpose of

³⁴ K. Misera, 204.

use and damage occurring to the goods owned by one of the *socii* and the third is the case of the so-called mixed *societas* in which one *socius* contributes his capital and the other only his work. With this kind of systematic approach, the problem was necessarily simplified. Although general principles and concepts are not very helpful here, still there is a rule of great importance, and that is *casum sentit dominus*. Additional requirements and criteria applied in determining whether the partners will jointly share the risk depend on whether they are co-owners or exclusive owners of the property contributed to the partnership, and whether they eventually contributed only their labour. Of course, all this applies unless the partners have agreed otherwise.